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H LaDon Baltimore

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T.R.A. DOCKET ROOM

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March 7, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

**VIA HAND DELIVERY**

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection  
Agreements Resulting From Changes of Law; Docket No. 04-00381

Dear Sharla:

Enclosed for filing please find the original and 13 copies Joint Arbitration Petitioners'  
Motion to Bifurcate in the above-referenced cause of action.

Thank you for your assistance. If you have questions, please do not hesitate to contact  
me.

Sincerely,



H LaDon Baltimore  
Counsel for Joint Petitioners

LDB/dcg  
Enclosures  
cc: Parties of record

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BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE

2005 MAR -7 PM 1:47

T.R.A. DOCKET ROOM

IN RE:

PETITION TO ESTABLISH GENERIC  
DOCKET TO CONSIDER AMENDMENTS  
TO INTERCONNECTION AGREEMENTS  
RESULTING FROM CHANGES OF LAW

DOCKET NO. 04-00381

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MOTION TO BIFURCATE OF KMC, NUVOX/NEW SOUTH,  
AND XSPEDIUS

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NuVox Communications, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corporation (collectively "NuVox/NewSouth"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Chattanooga, LLC (collectively "Xspedius") (collectively "Joint Arbitration Petitioners"), through their undersigned counsel, respectfully submit this re-styled and modified Motion to Bifurcate.<sup>1</sup> This Motion is submitted in response to the pleadings filed with the Tennessee Regulatory Authority ("Authority") by BellSouth Telecommunications, Inc. ("BellSouth") requesting that the Authority establish a generic proceeding to examine issues related to BellSouth's obligations to provide unbundled network elements.<sup>2</sup>

In lieu of seeking dismissal and in light of developments prior to and during the Authority's January 31, 2005 status conference in this proceeding, Joint Arbitration Petitioners herein move for the bifurcation of this generic proceeding into two phases. The first phase would be to address issues that have been negotiated and are – or otherwise are – "ripe" for

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<sup>1</sup> Joint Arbitration Petitioners' Motion to Dismiss filed on December 8, 2004 is to be replaced with this filing

<sup>2</sup> Joint Arbitration Petitioners did not join CompSouth's Motion to Dismiss filing, but instead filed separately so that they may focus on the specific and unique concerns raised by their pending arbitration and Abeyance Agreement with BellSouth

adjudication/arbitration by the Authority now. These issues include issues related to the FCC's *Triennial Review Order* ("TRO") which were neither remanded nor vacated by *USTA II*.

Although Joint Arbitration Petitioners have negotiated resolution of many of the *TRO* issues (and have arbitrated others) that appear on the recently filed issues lists, Joint Arbitration Petitioners believe that, with about a year-and-a-half having passed since those rules became effective, these issues generally can be considered "ripe" and ready for review by the Authority

The second phase of this generic proceeding would be to address issues that arise from requisite negotiations related to the changes of law put in place with the FCC's *Triennial Review Remand Order* ("TRRO"). Even if issues related to the *TRRO* can be identified now, it is unclear whether some can be resolved via negotiations or whether some will evolve into other issues or whether additional issues may arise. Indeed, there are several potential issues that Joint Arbitration Petitioners declined to put on an issues list at this point, so as not to create issues that they were not certain would arise.

This two-phase construct, however, is not intended to forestall that adjudication of Joint Arbitration Petitioners' Motion for Emergency Relief<sup>3</sup> or any other matter where a conflict is "ripe." As set forth in that Petition, the need for the relief requested therein is pressing, as BellSouth threatens to end-run the Section 252 process, defy the express directive of the FCC, and breach existing interconnection agreements as of March 11, 2005.<sup>4</sup>

The premise of this Motion is that the Section 252 interconnection agreement process established by the Act requires negotiations. The *TRRO* requires that this process be followed.<sup>5</sup> The Authority should not curtail the process of negotiations nor should it endeavor to resolve disputes before they are "ripe." Premature action could unnecessarily diminish incentives to

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<sup>3</sup> Joint Arbitration Petitioners' Motion for Emergency Relief, Docket No. 04-00381 (filed Feb. 25, 2005)

<sup>4</sup> One Bell company, Qwest, apparently has dropped this gambit initially engaged in by the Bells as a uniform block

<sup>5</sup> *TRRO* ¶ 233.

engage in meaningful negotiation. It could also unnecessarily increase burdens on the Authority and the parties resulting from litigation of too many issues. As the out-sized player in this arena, BellSouth enjoys a resource advantage that puts its much smaller competitors at a continual disadvantage. This disadvantage would be exacerbated if Joint Arbitration Petitioners were forced to litigate issues in this docket before they were ripe or were forced to engage in such litigation while the required initial negotiations were taking place.<sup>6</sup>

As the Authority is well aware, Joint Arbitration Petitioners have a pending arbitration proceeding with BellSouth in Docket No 04-00046. As contemplated by Sections 251 and 252 of the Act, these parties negotiated first with BellSouth and then sought arbitration of issues that could not be resolved through voluntary negotiation. The parties, through voluntary negotiation, have resolved many issues related to BellSouth's obligations to provide unbundled network elements (including several that BellSouth seeks to be resolved in a generic proceeding). They have been unable to resolve and have requested Authority arbitration of others. This process has been underway for more than two years.

On October 15, 2004, Joint Arbitration Petitioners filed jointly with BellSouth a revised issues matrix incorporating nine new issues related to the post-*USTA II* regulatory framework.<sup>7</sup> The revised issues matrix, adding new issues to the pending arbitration, was the result of a voluntarily negotiated agreement by Joint Arbitration Petitioners with BellSouth which was memorialized in a joint motion for abeyance filed with the Authority on July 15, 2004 ("Abeyance Agreement") and incorporated into the Authority's July 16, 2004 Order granting the joint motion for abeyance. As recognized in the Authority's Order, Joint Arbitration Petitioners reached an agreement with BellSouth wherein Joint Arbitration Petitioners would not amend

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<sup>6</sup> Joint Arbitration Petitioners are well aware that negotiations continue even after litigation commences. However, once litigation commences, it is impossible to devote undivided attention to negotiations and deadlines associated with litigation often command what are relatively and typically scarce CLEC resources.

<sup>7</sup> Of the nine Supplemental Issues added, one is a modification of an issue included in the original set of issues and another one (S-8) has been resolved.

their existing interconnection agreement UNE provisions (Attachment 2), but would rather operate pursuant to those provisions until the parties were able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of the arbitration in Docket No. 04-00046. Thus, Joint Arbitration Petitioners respectfully request the Authority to be mindful of that voluntarily negotiated Abeyance Agreement and to clarify in any order resulting from the above-captioned generic docket, that such order does not alter Joint Arbitration Petitioners' agreement with BellSouth to operate under and not to amend their existing interconnection agreements to effectuate post-*USTA/TRRO* unbundling requirements, but to instead address and incorporate such changes-of-law associated with the post-*USTA II* regulatory framework in their new interconnection agreements already undergoing arbitration by the Authority.<sup>8</sup>

Joint Arbitration Petitioners note that the addition of issues related to the post-*USTA II* regulatory framework to the parties' arbitration was rejected by the Pre-Hearing Officer in Docket No. 04-00046 in light of the potential for addressing such disputes by other means, such as this generic proceeding.<sup>9</sup> Joint Arbitration Petitioners, in conjunction with CompSouth, have proposed that many of those issues be included in this generic proceeding (others are now all but moot). That said, there are still likely to be overlapping issues between the arbitration and

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<sup>8</sup> To the extent that decisions made in this proceeding need to be incorporated into the new interconnection agreements that will ensue from the arbitration in Docket No. 04-00046, the Authority needs to establish an appropriate procedure for folding the results of this docket back into the arbitration docket. In particular, such procedure would need to provide an opportunity to establish contract language that reflects any Authority decision in the generic proceeding while not conflicting with language established as a result of voluntary negotiation or Authority resolution of issues in the arbitration docket. Notably, BellSouth attaches to its petition an entirely new "Attachment 2." Joint Arbitration Petitioners believe that the Authority should reject that attachment and require (if it were at some point to proceed with a generic) BellSouth to re-file issue specific language proposals in a matrix that features alongside those proposals the language BellSouth seeks to reflect from an existing agreement and the language proposed by various CLECs, as a result of efforts to negotiate or arbitrate such provisions. Not every provision of Attachment 2 was called into question by *USTA II* and the decisions that follow in its wake (the FCC Interim Rules Order and the *TRRO*).

<sup>9</sup> Joint Arbitration Petitioners note that BellSouth asserts that "everyone will have an opportunity to be heard" in the generic proceeding it requests. BellSouth Petition at para. 6. After fighting (with only mixed success) a series of BellSouth filings designed to force redundant arbitrations or to otherwise ensure that each of the Joint Arbitration Petitioners could not be heard in their own arbitration proceeding, Joint Arbitration Petitioners view BellSouth's assertion with a high degree of skepticism. In any generic proceeding, the Authority should adopt procedures to ensure that individual CLECs have the opportunity to participate and present witnesses freely (which may include independent presentations, group presentations or some combination thereof selected by an individual CLEC).

proposed generic proceeding. To the extent that Joint Arbitration Petitioners have arbitrated an issue in their arbitration docket, they do not wish to re-arbitrate the issue in this docket.

Faced with conflicting sets of issues and concerns, as well as an array of differently situated carriers, the Authority should proceed cautiously. The Authority should reject any BellSouth attempt to end-run the Section 252 process or to displace negotiations. Provided that the Section 252 process is followed, the industry is not faced with a general crisis, as BellSouth disingenuously suggests in its remarkable “emergency” motion.<sup>10</sup> Existing interconnection agreements do not magically expire or transform.<sup>11</sup> Rather, the parties should engage in good faith negotiations regarding the implementation of the *TRRO*, before the Authority devotes significant resources to adjudicating issues that might stem therefrom.

And so, the Authority should require, as the 1996 Act does, that parties negotiate first and arbitrate only if such negotiations fail. Indeed, BellSouth shared with Joint Arbitration Petitioners a preliminary version of the matrix it was preparing for this proceeding (it did so with other CLECs as well) and it was immediately apparent that the majority of the issues proposed already were resolved vis-à-vis BellSouth and Joint Arbitration Petitioners through voluntary negotiations. Other issues had never been negotiated. And still other issues that were raised and incorporated into the matrix filed in the arbitration docket were not raised by BellSouth in its proposed list of issues for a generic docket. Notably, BellSouth filed its proposed contract language in this proceeding *before* it had proposed similar language to the Joint Arbitration Petitioners as part of their ongoing arbitration. Thus, with respect to the Joint Arbitration Petitioners, and likely many others, BellSouth’s representation that it has been unable to agree on

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<sup>10</sup> Notably, a proceeding of the kind contemplated by BellSouth’s petition certainly could not be handled in a one day hearing (as BellSouth suggests), if every party is to be able to have ample opportunity to be heard (as BellSouth claims would be the case). In Docket No. 04-00046, BellSouth has filed nearly 50 pages of testimony related to the Supplemental Issues - which represents a subset of the issues raised in its proposed issues matrix for the generic proceeding. Joint Arbitration Petitioners have filed nearly 100 pages of testimony on those same issues.

<sup>11</sup> Indeed, the only “emergency” evident is the one created by BellSouth’s announced intention to breach or unilaterally modify its interconnection agreements as of March 11, 2005. See Joint Arbitration Petitioners’ Motion for Emergency Relief, Docket No. 04-00381 (filed Feb. 25, 2004).

language with many CLECs (BellSouth Petition at para. 5) should certainly have been accompanied by the admission that BellSouth simply had not tried, but instead was trying to upend statutory and contractual negotiations requirements.

WHEREFORE, Joint Arbitration Petitioners respectfully request that the Tennessee Regulatory Authority bifurcate the generic proceeding, so that issues that are now ripe may be addressed expeditiously and so that issues that may develop after negotiations with respect to the Final Rules/*TRRO* may be addressed in a second phase of the proceeding.

Respectfully submitted,



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Counsel for KMC, NuVox/NewSouth and Xspedius

March 7, 2005

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U. S. Mail, first class postage prepaid, overnight delivery, electronic transmission, or facsimile transmission to the following, this 7<sup>th</sup> day of March, 2005.

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